

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The text is overlaid on this graphic.

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*Indian Gaming Regulatory Act: Gaming on Newly Acquired
Lands*

M. Maureen Murphy, American Law Division

Updated May 28, 2008

Abstract. The Indian Gaming Regulatory Act (IGRA) (P.L. 100-497) generally prohibits gaming on lands acquired for Indians in trust by the Secretary of the Interior (SOI) after October 17, 1988. The exceptions, however, raise the possibility of Indian gaming proposals for locations presently unconnected with an Indian tribe. Among the exceptions are land: (1) acquired after the SOI determines acquisition to be in the best interest of the tribe and not detrimental to the local community and the governor of the state concurs; (2) acquired for tribes that had no reservation on the date of enactment of IGRA; (3) acquired as part of a land claim settlement; (4) acquired as part of an initial reservation for a newly recognized tribe; and (5) acquired as part of the restoration of lands for a tribe restored to federal recognition.

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CRS Report for Congress

Indian Gaming Regulatory Act (IGRA): Gaming on Newly Acquired Lands

Updated May 28, 2008

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Prepared for Members and
Committees of Congress

Indian Gaming Regulatory Act (IGRA): Gaming on Newly Acquired Lands

Summary

The Indian Gaming Regulatory Act (IGRA) (P.L. 100-497) generally prohibits gaming on lands acquired for Indians in trust by the Secretary of the Interior (SOI or Secretary) after October 17, 1988. The exceptions, however, raise the possibility of Indian gaming proposals for locations presently unconnected with an Indian tribe. Among the exceptions are land: (1) acquired after the SOI determines acquisition to be in the best interest of the tribe and not detrimental to the local community and the governor of the state concurs; (2) acquired for tribes that had no reservation on the date of enactment of IGRA; (3) acquired as part of a land claim settlement; (4) acquired as part of an initial reservation for a newly recognized tribe; and (5) acquired as part of the restoration of lands for a tribe restored to federal recognition.

On May 20, 2008, the Bureau of Indian Affairs (BIA) of the Department of the Interior (DOI) issued a final regulation specifying the standards to be satisfied by tribes seeking to conduct gaming on lands acquired after October 17, 1988. The regulation includes limiting definitions of some of the statutory terms and considerable specificity in the documentation required for tribal applications. Previously, on January 4, 2008, it issued departmental guidance on off-reservation acquisitions for gaming and rejected more than 20 tribal applications for taking off-reservation land into trust for gaming purposes.

Legislative proposals include H.R. 1654 and H.R. 2562, which contain provisions to tighten the standards for tribes to secure exceptions to IGRA's prohibition on gaming on lands acquired after 1988, and several bills dealing with recognition of particular tribes or transfers of specific pieces of property (S. 310/H.R. 505, S. 375/H.R. 679, H.R. 28, H.R. 65, H.R. 106, H.R. 673, H.R. 1294, and H.R. 3490), which include provisions that preclude gaming. Two bills, H.R. 2176 and H.R. 4115, would ratify land claim settlement agreements and authorize trust acquisition of land in Michigan which would qualify for gaming. H.R. 3752 would provide that IGRA will not apply to a newly recognized tribe until it has been continuously recognized for 25 years. H.R. 3787 would require a local public hearing before a trust acquisition.

This report will be updated as warranted.

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Indian Gaming Regulatory Act (IGRA): Gaming on Newly Acquired Lands

Requirements for Gaming on “Indian Lands”

The Indian Gaming Regulatory Act (IGRA)¹ provides a framework for gaming on “Indian lands,”² according to which Indian tribes may conduct gaming that need not conform to state law. The three classes of gaming authorized by IGRA progress from class I social gaming, through class II bingo and non-banking card games, to class III casino gaming.³ One of the requirements for class II and class III gaming is that the gaming be “located in a State that permits such gaming for any purpose by any person, organization or entity.”⁴ The federal courts have interpreted this to permit tribes to conduct types of gaming permitted in the state without state limits or conditions. For example, tribes in states that permit “Las Vegas” nights for charitable purposes may seek a tribal-state compact for class III casino gaming.⁵ On the other hand, the fact that state law permits some form of lottery or authorizes a state lottery is not, in itself, sufficient to permit a tribal-state compact permitting all forms of casino gaming.⁶

Geographic Extent of IGRA Gaming

A key concept of IGRA is its territorial component. Gaming under IGRA may only take place on “Indian lands.” That term has two meanings. (1) “all lands within the limits of any Indian reservation”; and (2) “any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against

¹ P.L. 100-497, 102 *Stat.* 2467, 25 U.S.C. §§ 2701 - 2721; 18 U.S.C. §§ 1166 - 1168.

² 25 U.S.C. § 2703(4).

³ 25 U.S.C. §§ 2703((6) - (8), and 2710.

⁴ 25 U.S.C. §§ 2710(b)(1)(A), and 2710(d)(1)(B).

⁵ *Mashantucket Pequot Tribe v. State of Connecticut*, 737 F. Supp. 169 (D. Conn. 1990), *aff'd*, 913 F.2d 1024 (2nd Cir.1990), *cert. denied*, 499 U.S. 975 (1991). Compacts may prescribe, with exacting detail, the specifics of each game permitted. See, e.g., the compact between New York State and the Seneca Nation, Appendix A, listing 26 permitted games and the specifications for each, available at [<http://www.sni.org/gaming.pdf>].

⁶ *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F. 3d 1250 (9th Cir. 1994), *opinion amended on denial of rehearing*, 99 F. 3d. 321 (9th Cir. 1996), *cert. denied*, 521 U.S. 1118 (1997); *State ex rel. Clark v. Johnson*, 120 N.M. 562; 904 P. 2d 11 (1995).

alienation and over which an Indian tribe exercises governmental power.”⁷ Under the first alternative, gaming under IGRA may take place on any land within an Indian reservation, whether or not the tribe or a tribal member owns the land and whether or not the land is held in trust. Determining the applicable boundaries of a reservation is a matter of congressional intent and may entail a detailed analysis of the language of statutes ceding tribal reservation land, and the circumstances surrounding their enactment as well the subsequent jurisdictional history of the land in question.⁸

The second alternative has two prongs: (a) the land must be in trust or restricted⁹ status, and (b) the tribe must exercise governmental authority over it. Determining trust or restricted status involves Department of the Interior (DOI) records. Determining whether a tribe exercises governmental authority may be a simple factual matter involving whether the tribe has a governmental organization that performs traditional governmental functions such as imposing taxes.¹⁰ On the other hand, it could be a matter requiring judicial construction of federal statutes.¹¹

How Land is Taken Into Trust

Congress has the power to determine whether to take tribal land into trust.¹² There are many statutes that require DOI to take land into trust for a tribe or an individual Indian.¹³ An array of statutes grant the Secretary of the Interior (SOI) the

⁷ 25 U.S.C. § 2703(4).

⁸ See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Solem v. Bartlett*, 465 U.S. 463 (1984).

⁹ “Restricted fee land” is defined to mean “land the title to which is held by an individual Indian or tribe and which can only be alienated or encumbered by the owner with the approval of the SOI because of limitations in the conveyance instrument pursuant to federal law.” 25 C.F.R. § 151.2 If restricted land is involved, it may only be considered “Indian lands,” for IGRA purposes if the tribe “exercises governmental power” over it. *Kansas v. United States*, 249 F. 3d 1213 (10th Cir. 2001), held that a tribe could not accept governmental authority by consent from owners of restricted land whom the tribe had accepted into membership.

¹⁰ See, e.g., *Indian Country U.S.A., Inc. v. Oklahoma*, 829 F. 2d 967 (10th Cir. 1987), involving a tribe that exercised taxing authority.

¹¹ See, e.g., *Rhode Island v. Narragansett Tribe of Indians*, 816 F. Supp 796 (D. R.I. 1993), *aff’d, modified*, 19 F. 3d 685 (1st Cir. 1994), *cert. denied* 513 U.S. 919 (1994). This case held that, despite the fact that a federal statute conveyed civil and criminal jurisdiction over a tribe’s reservation to a state, the criterion of exercising governmental power was satisfied by various factors including federal recognition of a government-to-government relationship, judicial confirmation of sovereign immunity, and a federal agency’s treatment of the tribe as a state for purposes of administering an environmental law.

¹² U.S. Const. art. I, § 8, cl. 3 (Indian Commerce Clause), and *id.*, art. IV, § 3, cl. 2 (Property Clause).

¹³ See, e.g., § 707 of the Omnibus Indian Advancement Act, P.L. 106-568, 114 Stat. 2868, 2915, 25 U.S.C. § 1042e, mandating that the SOI take any land in Oklahoma that the

(continued...)

discretion to acquire land in trust for individual Indian tribes; principal among them is the Wheeler-Howard, or Indian Reorganization Act of 1934 (IRA).¹⁴ Procedures for land acquisition are specified in 25 C.F.R., Part 151. By this process Indian owners of fee land, i.e., land owned outright and unencumbered by liens that impair marketability, may apply to have their fee title conveyed to SOI to be held in trust for their benefit. Among the effects of this process is the removal of the land from state and local tax rolls and the inability of the Indian owners to sell the land or have it taken from them by legal process to collect on a debt or for foreclosure of a mortgage.

“Indian Lands” Acquired After Enactment of IGRA

Lands acquired in trust after IGRA’s enactment are generally not eligible for gaming if they are outside of and not contiguous to the boundaries of a tribe’s reservation. There are exceptions to this policy, however, that allow gaming on certain “after acquired” or “newly acquired” land. One exception, sometimes referred to as a two-part determination, permits gaming on lands newly taken into trust with the consent of the governor of the state in which the land is located after SOI: (1) consults with state and local officials, including officials of other tribes; (2) determines “that a gaming establishment on the newly acquired lands would be in the best interest of the Indian tribe and its members”; and (3) determines that gaming “would not be detrimental to the surrounding community.”¹⁵

Other Exceptions for Gaming on Land Acquired after October 11, 1988

Other exceptions permit gaming on after-acquired land and do not require gubernatorial consent, consultation with local officials, or SOI determination as to tribal best interest and effect upon local community. They relate to any of five circumstances:

(1) Any tribe without a reservation on October 17, 1988, is allowed to have gaming on newly acquired lands in Oklahoma that are either within the boundaries of the tribe’s former reservation or contiguous to other land held in trust or restricted status by SOI for the tribe.¹⁶

(2) If a tribe that had no reservation on October 17, 1988, and is “presently” located in a state other than Oklahoma, it may have gaming on newly acquired lands

¹³ (...continued)

Shawnee Tribe transfers.

¹⁴ Act of June 18, 1934, ch. 57, 48 *Stat.* 985, 25 U.S.C. § 465. This statute specifies that such land is to be exempt from state and local taxation.

¹⁵ 25 U.S.C. § 2719(b)(1).

¹⁶ 25 U.S.C. § 2719(a)(2)(A)(i) and 2719(a)(2)(A)(ii).

in that state that are “within the Indian tribe’s last recognized reservation within the State.”¹⁷

(3) A tribe may have gaming on lands taken into trust as a land claim settlement.¹⁸

(4) A tribe may have gaming on lands taken into trust as the initial reservation of a tribe newly recognized under the Bureau of Indian Affairs’s process for recognizing groups as Indian tribes¹⁹;

(5) A tribe may have gaming on lands representing “the restoration of lands for an Indian tribe that is restored to federal recognition.”²⁰

Final Rule for Gaming on Newly Acquired Trust Lands

The Bureau of Indian Affairs (BIA) of the Department of the Interior (DOI) issued a final rule for gaming on newly acquired trust lands, 25 C.F.R., Part 292, on May 20, 2008.²¹ The new rule applies to all requests under 25 U.S.C. § 2719 on which there has not been final agency action prior to June 19, 2008, the effective date of the regulation. There is an exception to this for DOI or NIGC opinions issued

¹⁷ 25 U.S.C. § 2719(a)(A)(2)(B). There are other specific exceptions for certain lands involved in a federal court action involving the St. Croix Chippewa Indians of Wisconsin and the Miccosukee Tribe of Indians of Florida. 25 U.S.C. § 2719(b)(2).

¹⁸ Under this provision SOI took into trust a convention center in Niagara Falls, N.Y., now being used for casino gaming by the Seneca Nation, on the basis of legislation settling disputes over the renewal of 99-year leases in Salamanca, N.Y., 25 U.S.C. §§ 1174, et seq.

¹⁹ See CRS Report RS21109, *The Bureau of Indian Affairs’s Process for Recognizing Groups as Indian Tribes*, by M. Maureen Murphy. In an opinion on “Trust Acquisition for the Huron Potawatomi, Inc.,” the DOI Solicitor General’s office stated that “the first time a reservation is proclaimed ..., it constitutes the ‘initial reservation’ under 25 U.S.C. § 2719(b)(1)(B), and the ... [tribe] may avoid the ban on gaming on ‘newly acquired land’ for any lands taken into trust as part of the initial reservation — those placed in trust before or at the time of the initial proclamation. Land acquired after the initial proclamation of the reservation will not fall within the exception.” Memorandum to the Regional Director, Midwest Regional Office, Bureau of Indian Affairs 2 (December 13, 2000). [http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f33_nottawaseppihuronpotawatombnd.pdf&tabid=120&mid=957].

²⁰ 25 U.S.C. § 2719(b)(iii).

²¹ 73 *Federal Register* 29354. On October 5, 2006, the Bureau of Indian Affairs (BIA) issued a proposed regulation setting standards for determining whether class II or class III gaming may take place on after-acquired lands. 71 *Federal Register* 58769. The comment period was extended to February 1, 2007, 71 *Federal Register* 70335 (December 4, 2006); 71 *Federal Register* 70335 (January 17, 2007), and corrections issued. 71 *Federal Register* 70335. There were earlier proposed regulations that never became effective, 65 *Federal Register* 55471 (September 14, 2000). An earlier proposal, 57 *Federal Register* 51487 (July 15, 1991) was never issued in final form.

previously, which reserve “full discretion to qualify, withdraw or modify such opinions.”²²

In addition to specifying procedures for securing determinations as to whether land may qualify for one of IGRA’s exceptions to its prohibition on gaming on newly acquired trust lands, the rule specifies factors that will be considered in making determinations under the statute. The rule covers both the two-part Secretarial Determination that gaming would benefit the tribe and not be detrimental to the surrounding community and the other exceptions to IGRA’s ban on gaming on lands acquired after October 17, 1988: lands contiguous to the reservation boundaries; lands taken into trust on the basis of land claims settlements; initial reservations for newly acknowledged tribes; and lands restored to newly restored tribes. Requests for Secretarial Determinations must be directed to the SOI. Land-into-trust applications or applications requiring a determination of reservation status are to be directed to the BIA’s Office of Indian Gaming; requests for opinions on whether a particular parcel meets one of the other exceptions may be directed either to the BIA’s Office of Indian Gaming or the NIGC.²³

Secretarial Determination. The rule specifies both procedures and application requirements for Secretarial Determinations that gaming on newly acquired lands would be in the best interest of the tribe and not detrimental to the surrounding community.²⁴ The information to be included in consultation letters sent to state and local governments is specified.²⁵ The rule specifies that a tribal application for a Secretarial Determination may be submitted at the same time as the application to have the land taken into trust.²⁶ The regulation includes: (1) a definition of “surrounding community” that covers local governments and tribes within a 25-mile radius²⁷; (2) detailed requirements as to projections that must accompany the application respecting benefits to the tribe and local community, potential detrimental effects, and proposals to mitigate any detrimental impacts.²⁸ In addition to projected benefits and detrimental impacts, the application for the Secretarial Determination must include: (1) proof of present ownership and title

²² 25 C.F.R. § 292.26 (this and subsequent references to 25 C.F.R. Part 292 are to the version published in *73 Federal Register* 29354, 29375). The regulation specifies that it “shall not apply to applicable agency actions when, before the effective date ... the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. § 2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions.” 25 C.F.R. § 292.26(b).

²³ 25 C.F.R. § 292.3.

²⁴ 25 C.F.R. §§ 292.13 - 24.

²⁵ 25 C.F.R. § 292.20. The letter rule stipulates topics which recipients are to be asked to address in their comments; these parallel the potential detrimental effect factors which the tribe must address in its application. 25 C.F.R. §§ 292.20 (b) (1) - (6) (consultation letter); 25 C.F.R. §§ 292.18(b)-(g) (tribal application).

²⁶ 25 C.F.R. § 292.15.

²⁷ 25 C.F.R. § 292.2.

²⁸ 25C.F.R. §§ 292.17 - 18.

status of the land; (2) any approved gaming ordinance, tribal organic documents, or gaming management contract; (3) distance of the land from any tribal reservation or trust lands and from the tribal governmental headquarters; and (4) the class III gaming compact, if one has been negotiated, otherwise, the proposed scope, including size, of the gaming operation.²⁹

Among the detailed information which an application must contain on the projected benefits of the proposed gaming establishment are projections about income, tribal employment, benefits to the relationship with the non-Indian community; distance from the tribal government's location; and evidence of "significant historical connections, if any, to the land."³⁰ The rule also specifies that the following types of information may be included to "provide a basis for a Secretarial Determination": consulting agreements, financial and loan agreements, and any other agreements relating to the gaming establishment or the land on which it will be located.³¹

For evaluating the potential detrimental impact on the surrounding community, the rule requires submission of information to satisfy requirements of the National Environmental Policy Act; it also details a variety of factors that must be addressed as aspects of the potential impact on the social and economic life of the surrounding community. For example the application must address anticipated impacts on the community's character, land use patterns, economic development, and compulsive gambling within the community. Costs and potential sources of revenue to mitigate these effects must be identified. There is also a provision that requires an assessment of the impact on the "traditional cultural connection to the land" of any other tribe which has a significant historical connection to the land.³²

Upon determining that gaming on the new lands would be in the best interest of the tribe and not detrimental to the local community, SOI must notify the state's governor, who must concur in the determination within one year, with a possible one-time 180-day extension, or SOI will inform the applicant tribe that the application is no longer under consideration.³³

²⁹ 25 C.F.R. § 292.16.

³⁰ 25 C.F.R. § 292.17. "Significant historical connection" is defined elsewhere to mean "that the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation, the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." 25 C.F.R. § 292.2.

³¹ 25 C.F.R. § 291.17(j).

³² 25 C.F.R. § 292.18.

³³ 25 C.F.R. § 292.23.

Contiguous Lands. IGRA exempts newly acquired trust lands “within and contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988.”³⁴ The rule defines “contiguous” to mean “two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point”³⁵

Land Claim Settlement. IGRA includes an exception to its prohibition of gaming on after-acquired lands for “land ... taken into trust as part of ... a settlement of a land claim.”³⁶ The rule elaborates on this by setting forth three methods by which land resulting from a land claim may qualify for this exception: (1) the land may have been the subject of land claim settlement legislation³⁷; (2) the land may have been acquired under the settlement of a land claim executed by the parties, including the United States, which returns some land to the tribe and “extinguishes or resolves with finality the claims regarding the land returned”³⁸; or (3) the land may have been acquired under the settlement of a land claim not executed by the United States but entered into as a final court order or “is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue.”³⁹

Initial Reservation for A Newly Acknowledged Tribe. IGRA provides an exception to its prohibition on gaming on after-acquired lands for “lands ... taken into trust as part of ... the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process.”⁴⁰ To satisfy this exception, the rule requires that (1) the tribe must have been acknowledged through the administrative acknowledgment process under 25 C.F.R., Part 83; (2) the tribe must have no gaming facility under the newly restored lands exception under IGRA; and (3) the land must be the first proclaimed reservation after acknowledgment.⁴¹ If the tribe has no proclaimed reservation, the tribe must demonstrate its governmental presence and tribal population in the state and its significant historical connections with the area within the state, as well as a modern connection.⁴²

³⁴ 25 U.S.C. § 2719(a)(1).

³⁵ 25 C.F.R. § 292.2.

³⁶ 25 U.S.C. § 2719(b)(1)(B)(i).

³⁷ 25 C.F.R. § 292.5(a). The rule covers land “[a]cquired under a settlement of a land claim that resolves or extinguishes with finality the tribe’s land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe in legislation enacted by Congress.”

³⁸ 25 C.F.R. § 292(5)(B)(1).

³⁹ 25 C.F.R. § 292.5.

⁴⁰ 25 U.S.C. § 2719(b)(1)(B)(ii).

⁴¹ 25 C.F.R. §§ 292.6(a)(b) and (c).

⁴² 25 C.F.R. § 292.6(d). Two modern connections are mentioned, either of which would qualify: the land must be near where a significant number of tribal members reside; it must be within a 25-mile radius of tribal headquarters or facilities that have existed at least two

(continued...)

Restored Lands. IGRA provides an exception to its prohibition of gaming on after-acquired lands for “lands ... taken into trust as part of ... the restoration of lands for an Indian tribe that is restored to Federal recognition.”⁴³ The rule specifies that the tribe must satisfy three requirements before the restored lands exception may be invoked: (1) the tribe must have been federally recognized at one time⁴⁴; (2) it must have lost its government-to-government relationship with the federal government⁴⁵; and (3) it must have been restored to federal recognition.⁴⁶ The lands must meet certain criteria.⁴⁷ Trust acquisition of the lands may have been mandated by restoration legislation.⁴⁸ If trust acquisition is authorized but not mandated by restoration legislation and the legislation does not specify a particular geographic area, the rule requires that: (1) the lands must be in the state where the tribe’s government or population is located; (2) the tribe must demonstrate one or more modern connections to the land⁴⁹; (3) it must show significant historical connection to the land; and (4) there must be a temporal connection between the date of acquisition of the land and the date of the tribe’s restoration.⁵⁰ Similar requirements apply to tribes acknowledged under the administrative process, provided they have not had an initial reservation proclaimed after October 17, 1988. Tribes recognized

⁴² (...continued)

years at that location.

⁴³ 25 U.S.C. § 2719(b)(1)(B)(iii).

⁴⁴ The regulation provides a non-exclusive list of four methods by which a tribe may establish its having been federally recognized: (1) treaty negotiations with the United States; (2) the existence of a determination by DOI that the tribe could organize under the IRA or the Oklahoma Indian Welfare Act; (3) federal legislation indicating the existence of a government-to-government relationship; and (4) acquisition by the United States at one time of land for the benefit of the tribe. 25 C.F.R. §§ 292.8(a) - (d).

⁴⁵ Ways of establishing loss of government-to-government relationship that are specified in the rule are: termination legislation, restoration legislation, and “[c]onsistent historical written documentation from the Federal Government effectively stating that it no longer recognized a government-to-government relationship with the tribe or its members or taking action to end the government-to-government relationship.” 25 C.F.R. § 292.9.

⁴⁶ 25 C.F.R. § 292.7. To establish that it has been restored to federal recognition, a tribe must show: restoration legislation; recognition under the administrative process, 25 C.F.R., Part 83; or judicial determination in a settlement agreement entered into by the United States. 25 C.F.R. § 292.10.

⁴⁷ 25 C.F.R. §§ 292.11 - 12.

⁴⁸ 25 C.F.R. § 292.11(a) (requirements for trust acquisitions for tribes restored by federal legislation).

⁴⁹ Modern connections include: reasonable commuting distance of tribal reservation; if tribe has no reservation, land must be near where a significant number of tribal members reside; land must be within a 25-mile radius of where the tribal governmental headquarters have been for at least two years. 25 C.F.R. § 292.12(a).

⁵⁰ A temporal relationship may be evidenced by a tribe’s first request for newly acquired lands since restoration or if the tribe is not gaming on other lands, a request for trust acquisition within 25 years of restoration. 25 C.F.R. § 292.12(c).

by judicial determination or settlement agreement to which the United States is a party are also subject to similar requirements.⁵¹

BIA Guidance

On January 4, 2008, DOI issued departmental “Guidance on taking off-reservation land into trust for gaming purposes” and, based on the criteria in the guidance, sent letters to approximately 22 tribes either rejecting their applications to take off-reservation land into trust for Indian gaming or returning them as incomplete.⁵² The guidance is premised on the policy prompting the Indian Reorganization Act of 1934 (IRA),⁵³ which is the basis for the BIA’s authority to take land into trust for Indian tribes. That policy emphasized the abandonment of the earlier federal policy of allotment and provided a means for tribes to consolidate reservation lands.⁵⁴ The new guidance elaborates on the criteria set forth in up in 25 C.F.R. 151.11(b) which require BIA to scrutinize anticipated benefits from off-reservation acquisitions and heavily weigh state and local concerns about the jurisdictional, real property tax, and special assessment tax impacts. A key element of the guidance is an assessment of how much negative effect there will be on reservation life if proposed gaming facilities are located farther than “a commutable distance from the reservation,” including the assessment of (1) how the on-reservation unemployment rate will be affected; (2) the effect of any exodus of tribal members from the reservation on reservation life? (3) if tribal members leave the reservation, the impact on their descendants in terms of tribal membership and identification with the tribe; and (4) specific on-reservation benefits of the proposal,

⁵¹ 25 C.F.R. §§ 292.11(b) (administrative acknowledgment); 292.11(c) (judicial determination).

⁵² Denial letters were issued to: the Big Lagoon Rancheria, the Chemehuevi Indian Tribe, the Hannahville Indian Community, the Pueblo of Jemez, the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin, the Los Coyotes Band of Cahuilla & Cupeno Indians, the Mississippi Band of Choctaw Indians, the St. Regis Mohawk Tribe, the Stockbridge Munsee Community of Wisconsin, the Seneca-Cayuga Tribe of Oklahoma, and the United Keetoowah Band of Cherokee Indians. In addition BIA notified the following tribes that their applications were incomplete and no further action would be taken on them as submitted: Ysleta del Sur Pueblo, Turtle Mountain Band of Chippewa, Muckleshoot Tribe of Washington, Lower Elwha Tribe, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Kickapoo Tribe and Sac and Fox Nation, Ho-Chunk Nation, Dry Creek Rancheria, Colorado River Indian Tribes, Confederated Tribes of the Colville Reservation, and the Burns Paiute Tribe. Documents may be found at [<http://www.indianz.com/News/2008/006500.asp>].

⁵³ 25 U.S.C. §§ 461 et seq.

⁵⁴ The specific IRA provision upon which the trust acquisitions rely, however, does not limit the BIA’s power to take land into trust to lands within existing reservations. It reads as follows: “The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment lands, within or without existing reservations, including otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing lands for Indians.” 25 U.S.C. § 465. There is another IRA provision, 25 U.S.C. § 467, which specifically permits the SOI to proclaim “new Indian reservations on lands acquired pursuant” to various IRA provisions, including section 465.

including whether jobs will be created. The guidance presumes that state and local governments at a distance from a reservation will be unfamiliar with Indian trust land jurisdictional issues and that the distance from the reservation will hamper the efficiency of tribal government operations. Intergovernmental cooperative agreements are virtually required as is compatibility with state and local zoning and land use requirements.

Legislation

To date, in the 110th Congress, two bills, H.R. 1654 and H.R. 2562, have been introduced addressing the process by which gaming may be authorized on newly acquired lands. H.R. 1654 would apply the two-part SOI determination, but not the gubernatorial concurrence, to the exceptions for land claim settlements, initial reservations for newly recognized tribes, and restored lands for newly restored tribes. H.R. 2562 would require the state legislature as well as the governor to concur in the SOI two-part determination and eliminate the exceptions for land claim settlements, initial reservations for newly recognized tribes, and restored lands for newly restored tribes.

There are other bills, moreover, which would prohibit gaming in connection with providing federal recognition to a certain tribe or entity or transferring land to a particular tribe. Among them are the following:

S. 310 and H.R. 505 would provide a process for federal recognition of a Native Hawaiian governing entity and preclude gaming by that entity.

S. 375 and H.R. 679 would remove a particular limitation presently applicable to a parcel of real property in Marion County, Oregon, deeded by the United States to the Confederated Tribes of Siletz Indians of Oregon and the Confederated Tribes of the Grand Ronde Community of Oregon, and preclude gaming on the land.

H.R. 28 would transfer certain land in Riverside County, California, and San Diego County, California, from the Bureau of Land Management to be held in trust for the Pechanga Band of Luiseno Mission Indians, and restrict the use of the lands to “protection, preservation, and maintenance of the archaeological, cultural, and wildlife resources thereon.”

H.R. 65 would provide federal recognition for the Lumbee Tribe and preclude tribal gaming.

H.R. 106 would provide federal recognition for the Rappahannock Tribe and preclude gaming on lands taken into trust for the tribe.

H.R. 673 would direct the SOI to take lands in Yuma County, Arizona, into trust as part of the reservation of the Cocopah Indian Tribe and prohibit IGRA gaming on those lands.

H.R. 1294 would provide federal recognition for six Virginia Indian tribes and preclude tribal gaming.

H.R. 2176 would ratify a land claim settlement concluded between the Bay Mills Indian Community and the Governor of Michigan; extinguish that tribe's claim to certain lands in Charlotte Beach, Michigan; require the SOI to accept in trust specified land in Port Huron, Michigan; qualify that land for an exception to IGRA's prohibition of gaming on newly acquired land; and ratify the settlement agreement, which contains clauses typical of some included in class III gaming compacts.

H.R. 3490 would transfer administrative jurisdiction of certain federal lands from the Bureau of Land Management to the Bureau of Indian Affairs, to take such lands into trust for nongaming purposes for the Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria.

H.R. 3752 would specify that IGRA would not apply to an Indian tribe until the tribe has been recognized for not less than 25 years.

H.R. 3787 would require SOI to hold a public hearing in the surrounding community where land requested to be taken into trust for an Indian tribe is located in order to ascertain the needs and interests of that surrounding community.

H.R. 4115 would ratify a land claim settlement concluded between the Sault Ste. Marie Band of Chippewa Indians and the Governor of Michigan; extinguish that tribe's claim to certain lands in Charlotte Beach, Michigan; require SOI to accept in trust a specified parcel in Oswego County, Michigan, and a parcel in Romulus, Michigan; qualify those parcels for exceptions to IGRA's prohibition of gaming on newly acquired lands; and ratify the settlement agreement, which contains clauses typical of some included in class III gaming compacts and requires approval for the Oswego County trust acquisition by the Town of Vanderbilt and the Romulus acquisition by the City of Romulus.